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No. 90-767
No. A-370

# In the Supreme Court of the United States of America

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
*Petitioners,*

*v.*

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI AND IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:
FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000
STEVEN W. KORN
Vice President and General Counsel
Turner Broadcasting System, Inc.
One CNN Center
Atlanta, GA 30348
(404) 827-1561
*(Additional of Counsel listed inside cover)*

P. CAMERON DEVORE*
STUART F. PIERSON
DANIEL M. WAGGONER
BRUCE E. H. JOHNSON
STUART R. DUNWOODY
Davis Wright Tremaine
1752 N Street N.W.
Suite 800
Washington, D.C. 20036
(202) 828-2388
* *Counsel of Record for Petitioners*

DAVID C. KOHLER
Christian, Barton, Epps, Brent &
Chappell
1200 Mutual Building
Richmond, VA 23219
(804) 644-7851

JOHN J. DALTON
WILLIAM N. WITHROW, JR.
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, GA 30303
(404) 658-8000

TERRY S. BIENSTOCK
Frates Bienstock & Sheehe
Suite 3160
Southeast Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
(305) 358-7447

From the briefs before this Court, it is now plain that the continuing prior restraint on CNN was issued without even the most minimal compliance with the showing required by *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The brief of Respondent Manuel Noriega himself — as well as that of the United States — highlights the wholesale failure of Noriega, as the moving party, to discharge his burden.

CNN repeatedly pointed out to the trial court the availability of alternatives to the imposition of the "most serious and the least tolerable infringement on First Amendment rights," a prior restraint, *Nebraska Press*, 427 U.S. at 559. Noriega offered no real reason to that court why those alternatives would not work, and he has offered none here. Thus, Noriega speculates (p. 20) that a change of venue "may not" work because of the spectre of nationwide publicity. But he offers no refutation of the consistent experience of courts around the country in high visibility cases, including the Watergate trials, the Iran-Contra trials, and the ABSCAM prosecutions, that even the most intense nationwide publicity can be dealt with. *See* cases collected in *In re Charlotte Observer*, 882 F.2d 850, 855-56 (4th Cir. 1989). Similarly, Noriega disparages the value of voir dire and instructions to the jury, speculating that disclosure of "trial strategy" "may well" prevent selection of an impartial jury. (Noriega Br. at 20) But it is hard to accept this as an answer at all when such potentially prejudicial information as confessions (*Nebraska Press*) and videotapes of alleged criminal acts themselves[1] have been dealt with by voir dire and instructions. Nor does Noriega even address why steps already taken by the prosecution team to insulate itself from learning the contents of the tapes in CNN's possession would not serve

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[1] *See Columbia Broadcasting Systems, Inc. v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1983) (vacation of restraint against broadcast of tapes showing alleged criminal acts by John DeLorean).

fully to protect him against whatever damage is said to flow from CNN's telecast of the tapes.[2]

Similarly, Noriega's own words demonstrate that the restraint he sought could not be expected to be effective in protecting him, as *Nebraska Press* also requires. 427 U.S. at 565. Noriega's counsel informed the District Court that copies of the audio tapes in question were in the possession of the Panamanian government, among others. App. 98a, 99a. Just two days ago, Noriega himself repeated that in a formal statement to the District Court: "They [the United States government] have taken my money, deprived me of my lawyers . . . wire taped my telephone calls with my lawyers and *even given them to the Endara[Panamanian] government* and to the press."[3] Letter from Defendant Noriega to Honorable William M. Hoeveler (emphasis added).[4] It is difficult to imagine how an order prohibiting CNN's broadcast would prove a "workable method of protecting" Noriega's rights (*Nebraska Press*, 427 U.S. at 565) when, as Noriega affirms, the tapes have been distributed to a foreign government hostile to him to which the orders of the District Court do not run.

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[2] The prosecution team has repeatedly stated that it has not had, and will not have, access to any information derived from tapes of attorney-client communications. App. 75a, 76a, 85a, 88a, and 89a. Indeed, at one hearing, the government offered different counsel to hear any attorney-client tapes expressly to avoid any taint of the actual prosecution team. App. 103a, 104a.

[3] The record reflects the understanding of all parties that the tapes in question are copies of conversations taped by the government at the Miami Correctional Center. App. 30a, 34a; Transcript of Nov. 8 & 9 Hearing at 99-100 (a complete copy of which has been lodged in the Clerk's office); Transcript of Nov. 13 Hearing at 8 (the sealed log of attorney-client recordings was maintained by the government). The statement in the Brief of the United States (p. 2, n.1) that the record is silent on this issue is, therefore, in error.

[4] A copy of the letter submitted to the District Court is submitted as a supplemental appendix attached to this brief.

It is plain that Noriega cannot satisfy this Court's *Nebraska* test. The only way the prior restraint imposed here could be sustained is if the position of the United States were adopted, a position which holds that Noriega did not have to satisfy *any* burden at all until the District Court was satisfied that it had before it a full factual record — and that CNN's unwillingness (rooted in First Amendment concerns)[5] to put the tapes before the Court itself provided a sufficient basis to impose a prior restraint.

At first glance, the government's position is not without appeal. Why should a court not have every bit of evidence before it prior to making a significant ruling? Why should it not preserve the status quo by barring publication until it is satisfied that it can decide, based on all the evidence it deems relevant, how best to enforce the rulings of this Court? The reality, however, is that prior restraints are not like other court orders. They are, unlike all others, "presumptively unconstitutional." *Nebraska Press*, 427 U.S. at 558-59. They are based on the notion that the status quo is the right to print, not an enforced standstill that bars publication.[6] They are rooted in the understanding that unless the party seeking the restraint can meet an almost insurmountably "heavy burden," the restraint will not issue. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

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[5] *See Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978); *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983). Throughout the brief of the United States, the assumption is made — without reference to authority and without argument devoted to the point — that CNN's concerns were frivolous. The gravity of such concerns, however, is recognized in the decisions cited above, which reject unnecessary orders to produce in aid of prior restraints.

[6] *See, In Re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed*, 485 U.S. 693 (1988).

The government's argument comes down to little more than a proposed rule which would allow the initial issuance of a prior restraint *without satisfying any standards at all*. In effect, under this rule, the movant would be given an automatic pass from meeting any burden imposed by the First Amendment, let alone the extraordinary one imposed by the case law. There are, at the very least, serious flaws in this approach.

For one thing, this Court has already recognized that there is no lowered standard for a brief restraint to permit study of the materials at issue. As this Court's opinion in *Nebraska Press* noted:

> The Court's conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue.

427 U.S. at 559. In the *New York Times* case, of course, the court ultimately disapproved the restraints in question.[7]

Second, the government's approach, like the District Court's approach below, treats the *Nebraska* test as though it had only one part and as if the inadequacy of the record to resolve any one aspect automatically requires — in that analy-

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[7] That this Court granted a stay in the *New York Times* case does not advance the government's position. In that case, the United States sought to restrain publication of material that it represented, under oath, to all courts from the day the case began would, if published, "pose a grave and immediate danger to the security of the United States." 403 U.S. 713, 741 (Marshall, J., concurring). On the basis of that and similar representations, in the context of two cases which had led to conflicting results in the circuits about the same documents and at a time when the legal tests for the issuance of prior restraints were less than wholly clear, this Court stayed the *New York Times* from publishing the materials in its possession. None of those factors is present here.

sis — that a restraint be issued until the record is complete. But here, and indeed in most cases, we submit, the Court can conclude that one or more parts of the *Nebraska Press* inquiry can be resolved against the restraint — and hence the request for the restraint rejected — without need of the fullest possible record.

Thus, the absence of the tapes in this case is no impediment at all to consideration of at least two of the *Nebraska Press* requirements — the availability of alternatives and the efficacy of the prior restraint. Noriega's complete failure to explain why sequestering the prosecution would not prevent its taint cannot be explained by a lack of knowledge as to precisely what information CNN has. Whatever that information is, the prosecution lawyers can be fully shielded from it; indeed, they state they have already shielded themselves. Nor does lack of information about which tapes CNN has justify Noriega's failure to explain why, notwithstanding the availability of voir dire and other jury selection techniques, the trial court cannot find twelve jurors in metropolitan Miami "who would, under proper instructions, fulfill their sworn duty." *Nebraska Press*, 427 U.S. at 569.

In a similar vein, Noriega cannot show that a ban on CNN's telecast of the tapes will effectively prevent their dissemination by the government of Panama, or others who may possess them. In short, it is not lack of knowledge about the tapes that has prevented Noriega from satisfying the *Nebraska Press* standard; it is a substantive inability to justify a restraint that dooms his case.[8] *Nebraska Press* made clear that a movant seeking the extraordinary relief of a prior restraint must

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[8] In footnote 12 of its brief (p. 18), citing *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978) and *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), the United States appears to concede that where a court has sufficient information to otherwise determine the propriety of a prior restraint, requiring production of tapes or other source materi-

satisfy the most demanding standards to obtain any relief; Noriega could not and did not. On this basis and for this reason, the prior restraint should be set aside immediately.

As a final point, petitioners wish to make clear that they are *not* urging certain positions ascribed to them by respondents.

First, although many lower courts[9] and, indeed, several members of this Court, have questioned whether the *Nebraska Press* test can ever be satisfied, the Court need not reach that question to rule in CNN's favor here. The *Nebraska Press* standards simply were not met and cannot be met in this case. Indeed, this appears to be virtually uncontested.

Similarly, we do not contend that the material in CNN's possession may not be helpful in applying some element of those tests. We do contend, however, that the courts must hold a party seeking a prior restraint to its burden under *Nebraska Press*, and while a court may consider the disabilities the movant may labor under without such access,[10] the absence of such material does not substitute for the requisite showing, particularly when, as here, the record discloses that the *Nebraska* standards cannot be met.

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als is inappropriate. The government fails to recognize, however, that this is such a case.

[9] *See, e.g., Columbia Broadcasting System, Inc. v. United States District Court*, 729 F.2d 1174, 1178 & n.4 (9th Cir. 1983).

[10] It is, of course, true, however, that in most prior restraint cases the movant and the court will generally be "unable to predict the manner in which potentially prejudicial information would be published" or the "frequency" or "context", etc. (*Nebraska Press Association*, 427 U.S. at 599 (Brennan, J., concurring). In this as in so much else, the courts below erred in viewing the case before them as unique or unprecedented. The courts have dealt summarily with prior restraints on broadcasts without access to the planned broadcasts themselves (*see Goldblum v. NBC, supra*; *In re CBS, supra*). They have done so without the need for a new rule wholly eviscerating *Nebraska*. No such revision of that rule is required now.

Prior restraints frequently seem to offer an attractive way to avoid prejudicial pretrial publicity. They are, indeed, powerful medicine — so powerful, in fact, that they have been all but totally banned from being prescribed. As Attorney General Thornburgh recently advised members of the press: "You enjoy all but absolute protection against prior restraint, a right often — indeed, without present exception — upheld in the courts." *Legal Times*, Nov. 12, 1990, at 15.

To say this is not to quarrel with the proposition that "the First Amendment is part of the rule of law, not above it." (U.S. Br. at 16). It is simply to maintain that the First Amendment *is* law and that it should be enforced.

## CONCLUSION

It is respectfully submitted that the prior restraint on CNN now in effect should be stayed and the petition for a writ of certiorari granted or, in the alternative, the petition should be granted and the case set for immediate hearing on the merits of the petition.

Dated November 18, 1990.

Respectfully submitted,

P. CAMERON DEVORE*
STUART F. PIERSON
DANIEL M. WAGGONER
BRUCE E. H. JOHNSON
Davis Wright Tremaine
1752 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 828-2388

* Counsel of Record for Petitioner

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

STEVEN W. KORN
Vice President and General Counsel
Turner Broadcasting System, Inc.
One CNN Center
Atlanta, GA 30348
(404) 827-1561

DAVID C. KOHLER
Christian, Barton, Epps, Brent
& Chappell
1200 Mutual Building
Richmond, VA 23219
(804) 644-7851

JOHN J. DALTON
WILLIAM N. WITHROW, JR.
Troutman, Sanders, Lockerman
& Ashmore
1400 Candler Building
127 Peachtree Street, N.W.
Atlanta, GA 30043

TERRY S. BIENSTOCK
Frates Bienstock & Sheehe
200 South Biscayne Blvd.
Miami, FL 33131
(305) 358-7447

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**SECOND SUPPLEMENTAL APPENDIX**

November 16, 1990

Honorable William M. Hoeveler
United States District Court Judge
301 North Miami Avenue
Miami, FL

Dear Judge Hoeveler:

When I was brought to the United States, I mistakenly believed that I would be able to receive a fair trial. In order for this to come true, I also believed that I would be able to use my money to hire the lawyers of my choice. It is painfully obvious that the United States Government does not wish me to be able to defend myself and have done everything possible to deprive me of a fair trial and due process. They have taken my money, deprived me of my lawyers, video taped me in my cell, wire taped my telephone calls with my lawyers and even given them to the Endara Government and to the press.

I am a military man and I understand a good fight. I never expected a fair fight from the Government of the United States.

I never expected an equal fight, from the Government of the United States, but I also never expected to face a virtual army of prosecutors and investigators on such an uneven field of battle.

The United States Government wishes me to engage in combat in the courtroom with them, but my army is to consist of only three (3) unpaid soldiers whose loyalty is unquestionable, but are only allowed to be armed with hand guns and no support staff, while the prosecutor's office has nuclear weapons.

This they call a fair fight.

Obviously, it is to the benefit of the government that I cannot defend myself, for they fear what I know.

The battle I face ahead is very similar to when the United States invaded my country. That was one sided and unfair, and so is this battle.

The one shinning light through this legal nightmare has been Your Honor, Judge Hoeveler.

You have acted as honest and fair as any one could hope for.

You have done your very best to protect me and my rights from the overreaching and oppressive conduct of the Government.

You have ordered the Government to release my funds to pay my lawyers. It is not your fault that the Government went behind your back to deprive me of my chosen attorneys.

I realize that this case has implications to the highest levels of the United States Government, including the White House, and I also realize that many forces are at work beyond your honor's control.

I know you have done your best for me and I thank you.

I thank my lawyers for their diligence, hard work, and unending loyalty to me and this case. They have worked for 10 months with no remuneration, whatsoever, and for this, I will always be in their debt. I cannot and do not expect them to go on to the point of bankruptcy.

It pains me to know that I am being deprived of their services when the solution to the problem is so simple. When I was the leader of the Republic of Panama, the United States would ask many different things of me. They would ask me to arrest people, to allow the search of Panamanian flag vessels, to send people to the United States for trial and to freeze bank accounts. I know that when the United States seriously requests something of a foreign government, they get it.

The purported efforts of the United States Government to unfreeze certain of my funds to pay my lawyers and finance my defense was a sham. If the United States Government sincerely wanted those accounts unfrozen, they would have been unfrozen.

I am now at the mercy of a totally unfair and unjust system who chooses my prosecutors and now chooses my defense lawyers.

This is not justice, why should we pretend it is.

Yours truly,

General Manuel Antonio Noriega

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# REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

## CERTIFICATE OF SERVICE

I. P. Cameron DeVore, a member of the Bar of this Court, hereby certify that on this 18th day of November, 1990, three copies of the Reply Brief in Further Support of Application to Stay District Court Restraining Orders Pending Certiorari were served by courier upon Frank, A. Rubino, Esq., 2601 S. Bayshore Drive, Suite 1400, Coconut Grove, FL 33133, counsel for the respondent Noriega herein, and upon Dexter W. Lehtinen, Esq., United States Attorney, and Myles Malman, Esq., Assistant United States Attorney, 155 S. Miami Avenue, Miami, FL 33130, counsel for the respondent United States of

America, herein, and were served by hand upon the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

P. CAMERON DEVORE
Davis Wright Tremaine
Suite 800
1752 N Street, N.W.
Washington,D.C. 20036
(202) 828-2388

*Counsel of Record for Petitioners*